

Hai San Ice Industries Sdn Bhd v Tenaga Nasional Bhd

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HIGH COURT (SHAH ALAM) — JUDICIAL REVIEW NO 25–99 OF
2010

NURCHAYA ARSAD J

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13 APRIL 2012

*Civil Procedure — Action — Cause of action — Whether alleged tampering of
electricity meter invoked s 37(1), (3) & (14) of the Electricity Supply Act 1990*

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The respondent ('the defendant') entered into a contractual agreement with the applicant ('the plaintiff') to supply electricity. The contractual agreement between both the parties stipulated, inter alia, that the plaintiff would not tamper with the electricity supply meter which would cause unnecessary losses to the defendant. Subsequently, the plaintiff applied for judicial review ('encl 1') which was fixed for hearing but adjourned when the defendant raised an objection that the exercise of the power pursuant to s 38(1) of the Electricity Supply Act 1990 ('the Act') was not amenable by judicial review, but amenable by public law remedy as provided by O 53 r 2 of the Rules of the High Court 1980. The applicant contended that the respondent's action of intending to disconnect the applicant's electricity supply under s 38(1) of the Act without firstly proving the alleged offence and s 37 of the Act in a court of law was inconsistent with true spirit and intent of the Act.

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Held, dismissing the application:

The true spirit and intent of the Act is provided in the preamble. The Act was to regulate the electricity industry; sufficient supply of electricity by the respondent and efficient and proper use of electricity by the consumer. As such s 38(1) of the Act was enacted to empower the respondent to act swiftly in the event that there is any breach or tampering by the consumer. Whether the operation of s 38(1) of the Act requires the offence under s 37(1), (3) and (14) to be proven by due process of law was settled by virtue of the doctrine of stare decisis; *Claybricks Tiles Sdn Bhd v Tenaga Nasional Bhd* [2007] 1 MLJ 217 referred (see paras 13–15).

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[Bahasa Malaysia summary]

Responden ('defendan') memasuki perjanjian kontrak dengan pemohon ('plaintif') untuk membekalkan letrik. Perjanjian kontrak di antara kedua-dua pihak menetapkan, antara lain, bahawa plaintif tidak akan mengusik meter bekalan letrik yang akan menyebabkan kehilangan tidakperlu kepada defendan. Kemudiannya, plaintif memohon untuk semakan kehakiman ('lampiran 1') yang ditetapkan untuk pendengaran tetapi ditangguhkan

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- A apabila defendan membangkitkan bantahan bahawa pelaksanaan kuasa berikutan s 38(1) Akta Bekalan Elektrik 1990 ('Akta') tidak 'amenable' oleh semakan kehakiman, tetapi 'amenable' oleh remedi undang-undang am seperti yang diperuntukkan oleh A53 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980.
- B Pemohon berhujah bahawa tindakan responden dengan berniat untuk tidak menyambung bekalan letrik pemohon di bawah s 38(1) Akta tanpa pertama sekali membuktikan kesalahan yang didakwa dan s 37 Akta dalam mahkamah undang-undang tidak konsisten dengan semangat benar dan niat Akta.
- C **Diputuskan**, menolak permohonan:
Maksud tersirat dan niat Akta telah diperuntukkan di dalam mukadimah. Akta adalah untuk mengawal industri letrik; bekalan letrik yang mencukupi oleh responden dan penggunaan letrik yang cekap dan betul oleh pengguna. Oleh itu s 38(1) Akta digubal untuk memberi kuasa kepada responden untuk
- D bertindak segera jika terdapat apa-apa kemungkiran atau pengusikan oleh pengguna. Sama ada s 38(1) Akta memerlukan kesalahan di bawah s 37(1), (3) and (14) dibuktikan oleh proses undang-undang yang betul ditetapkan berdasarkan doktrin *stare decisis*; *Claybricks Tiles Sdn Bhd v Tenaga Nasional Bhd* [2007] 1 MLJ 217 dirujuk (lihat perenggan 13–15).]
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Notes

For cases on cause of action, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 50–71.

F Cases referred to

Claybricks & Tiles Sdn Bhd lwn Tenaga Nasional Bhd [2007] 1 MLJ 217; [2006] 4 CLJ 892, CA (refd)

G *Dai-Ichi Electronics (M) Sdn Bhd v Tenaga Nasional Bhd* [1996] 4 MLJ 506, HC (refd)

Queen v Minister of Energy and Director General of Electricity Supply ex parte Robert Guildford [1998] EWHC Admin 203 (refd)

H *Tan Yeong Kim v Tenaga Nasional Bhd* [2000] MLJU 447; [2000] 8 CLJ 629, HC (refd)

WRP Asia Pacific Sdn Bhd v Tenaga Nasional Berhad [2012] 4 MLJ 296, FC

Legislation referred to

Electricity Supply Act 1990 ss 37, 37(1), (3), (14), 38(1)

I Rules of the High Court 1980 O 53 r 2

Paari Perumal (Perumal Brothers) for the applicant.

Raja Ahmad (Mahzemudin and Nazatul with him) (Azmi & Associate) for the respondents.

Nurchaya Arsad J:

INTRODUCTION

[1] The applicant's application for judicial review dated 22 September 2010 (encl 1) was fixed for hearing on 18 January 2012. However, the hearing was adjourned because parties wish to further submit oh the objection raised by the respondent in view of the recent Federal Court decision in *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Berhad* [2012] 4 MLJ 296 (Civil Appeal Nos 02(f)-4 of 2011(W) and 02(f)-3 of 2011(W)).

[2] The respondent's contention was that, the exercise of the power pursuant to s 38(1) of the Electricity Supply Act 1990 was not amendable by judicial review, which was a public law remedy.

[3] Order 53 r 2 of the Rules of the High Court 1980 provides as follows:

Any person who is adversely affected by the decision of any *public authority* shall be entitled to make the application.

[4] The issue that lies before the court now, is whether the actions of the respondent, comes within the commercial or contractual environment, or was it performing its responsibility to the public?

THE FACT

[5] The facts of this case reveal that the applicant here is a consumer who had requested the electricity supply from the respondent. Both parties had entered into contract for supply. This was evident from exh TNB1, of the respondent's affidavit in reply. This clearly created a private relationship between the applicant and the respondent which was contractual in nature. Both parties are expected to perform their part as stipulated in the court ie the respondent to supply electricity, and the applicant not to tamper with the electricity meter which in turn will cause unnecessary losses to the respondent.

[6] The learned Federal Court judges when deliberating in the case of *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Berhad* [2012] 4 MLJ 296, referred to the case of *Queen v Minister of Energy and Director General of Electricity Supply ex parte Robert Guildfort* [1998] EWHC Admin 203 which held as follbws:

The guidance given by the second respondent to electricity suppliers in this context is in my judgment entirely within the meaning properly to be given, in particular, to Schedule 7 para 11 of the Electricity Act 1989. Accordingly the primary declaration sought by the applicant must be refused.

- A As to the standard of proof, I see no reason to dissent from the test accepted by the court in the case of *Smith* and propounded by the Northern Ireland Courts in the case of *Sherlock*. Tampering with an electricity meter falls to be treated as a breach of private law, as well as criminal offence.
- B [7] Therefore, the respondent here was not acting as ‘public authority’ when it’s exercising its duty under s 38(1) of the Electricity Supply Act 1990 within the meaning of O 53 r 2 of the Rules of High Court 1980.
- C [8] The applicant also contended that the case of *WRP Asia Pacific Sdn Bhd* can be distinguished from the instant application, as leave to commence judicial review had already been granted by this court, whilst in *WRP Asia Pacific Sdn Bhd*, leave was refused by the High Court. The court is still requires to re-visit the same issues of law raised during leave stage and to consider its merits at the application proper. The act by the respondent that was challenged
- D in the instant proceeding was by nature, not amendable to judicial review.
- [9] Section 38(1) of the Electricity Supply Act provides as follows:
- E (1) Where any person employed by a licensee finds upon any premises evidence which in his opinion proves that an offence has been committed under section 37(1), 37(3) or 37(14), the licensee or any person duly authorized by the licensee may, upon giving not less than twenty-four hours’ notice, in such form as may be
- F prescribed, cause the supply of electricity to be disconnected from the said premises.
- [10] The applicant contended that the respondent’s action of intending to disconnect the applicant’s electricity supply under s 38(1) without firstly
- G proving the alleged offence in a court of law is inconsistent with the true spirit and intent of the Electricity Supply Act 1990. The applicant contended that the true spirit and intent of the said Act is for the public prosecutor to prefer a criminal charge, if there is an offence allegedly committed under s 37. The determination of guilt must be done by due process of the law, and upon the
- H finding of guilt, action under s 38(1) can be enforced. The applicant based its submission on the decision by Vincent Ng J (as he then was) in the case of *Dai-Ichi Electronics (M) Sdn Bhd v Tenaga Nasional Bhd* [1996] 4 MLJ 506, which was reproduced as follows:
- I Consequently, the words ‘proves that an offence has been committed under s 37(1), (3) and (14)’ following the words ‘in his opinion’ in s 38(1), would indicate that disconnection followed by reconnection of electrical supply are the approved steps that can be carried out by TNB only after the consumer is proved by evidence in the court of law to have committed an offence under s 37(1), (3) and (14). This is

especially so as s 37(1), (3) and (14) all talk of offences resulting in conviction, Surely, the words 'proves' appearing in s 38(1) envisages proof before a court of law and not before an employee of TNB.

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[11] Another conflicting High Court decision was in the case of *Tan Yeong Kim v Tenaga Nasional Bhd* [2000] MLJU 447; [2000] 8 CLJ 629, Alauddin J (as he then was) held as follows:

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Setelah saya teliti peruntukan s 38(1) seperti yang tersebut di atas ingin saya nyatakan di sini bahawa pada hemat saya adalah jelas dan nyata bahawa di dalam keadaan di mana TNB (melalui pekerjaanya) dapat mengesan bukti-bukti ataupun kesian-kesan yang jangka telah diusik pada mana-mana premis dan pada hemat TNB menunjukkan kesalahan-kesalahan di bawah Akta telah dilakukan, maka TNB berhak memotong bekalan di premis tersebut, dengan memberi notis 24 jam.

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Pada penghakiman saya s 38(1) ini tidak memerlukan satu pembuktian kesalahan oleh mahkamah sebagai pra-syarat sebelum kuasa pemotongan dapat dilaksanakan oleh TNB sebagai pemegang lesen. Sayugia diingatkan bahawa TNB sebagai badan yang dipertanggungjawabkan untuk membekal tenaga elektrik ke seluruh negara seharusnya diberikuasa menjalankan tanggungjawabnya sejajar dengan peruntukan undang-undangnya iaitu Akta Bekalan Elektrik 1990 khasnya. Justeru, apabila s 38(1) menyatakan bahawa 'pemegang lesen atau mana-mana orang yang diberikuasa sewajarnya boleh ...' ini bermakna bahawa TNB (atau pekerjaanya) boleh melalui hemat dan pendapatnya menentukan dengan wujudnya bukti-bukti atau keterangan-keterangan yang ada di mana-mana premis bahawa satu kesalahan telah dilakukan. Tidaklah perlu baginya menunggu satu kesalahan, dibuktikan oleh mahkamah sebelum kuasa pemotongan boleh dilaksanakan. Sekiranya proses pembuktian kesalahan melalui mahkamah diperlukan saya khuatir ianya akan memakan masa yang lama sebelum kuasa di bawah s 38(1) ini dapat digunakan. Mengenai perkara ini saya bersependapat dengan penghakiman hakim Raus Sharif dalam kes *Leong Hup Poultry Sdn Bhd v Tenaga Nasional Bhd* apabila YA menyatakan:

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Jika setiap kesalahan di bawah s 37(1), (3) dan (14) perlu melalui proses mahkamah untuk menentukan samada sesuatu kesalahan telah dilakukan sebelum tindakan di bawah s 38(1) boleh diambil saya percaya ia akan menimbulkan kesulitan kepada TNB dan ianya adalah bertentangan dengan kehendak s 38(1) Akta 447 yang pada pendapat saya adalah peruntukan yang jelas dan terang.

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Pada hemat saya s 38(1) digubal begitu rupa ialah semata-mata bertujuan memberi kuasa efektif kepada TNB memberhentikan dengan segera sebarang kesalahan yang berlaku dan tidak dibiarkan berlarutan. Dengan kata lain s 38(1) merupakan satu cara bagi TNB menyelamatkan banyak tenaga eklektrik yang boleh gunakan secara haram. Namun demikian ianya bukanlah merupakan kuasa penamat kepada TNB. Tindakan untuk mendakwa mereka yang melakukan kesalahan-kesalahan di bawah Akta masih boleh diambil di bawah s 37(1), (3) dan (14). Di sana Akta telah menetapkan hukuman yang lebih berat kepada pesalah-pesalah.

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A [12] The position as to whether the operation of s 38(1) of the said Act requires the offences under s 37(1), (3) and (14) to be proven by due process of law was settled, as per the Court of Appeal decision in the case of *Claybricks & Tiles Sdn Bhd v Tenaga Nasional Bhd* [2007] 1 MLJ 217; [2006] 4 CLJ 892, where Zulkefli Makinudin JCA (as he then was) held as follows:

B Kami perlu menyatakan di sini bahawa peruntukan s 38(1) Akta tersebut adalah jelas dan terang di mana proses mahkamah tidak diperlukan untuk menentukan sam ada sesuatu kesalahan telah dilakukan sebelum tindakan di bawah seksyen tersebut boleh diambil. Sekiranya proses pembuktian kesalahan melalui mahkamah diperlukan ianya akan mengambil masa yang lama sebelum kuasa di bawah s 38(1) dapat digunakan. Kami berpendapat s 38(1) Akta tersebut telah diperuntukkan secara spesifik untuk menjaga kepentingan TNB dan membolehkan TNB bertindak cepat dan dengan itu dapat mencegah penyalahgunaan seperti pencurian bekalan elektrik yang dibekalkan oleh TNB. Jika badan perundangan berniat bahawa pembuktian kesalahan melalui mahkamah diperlukan sebelum kuasa di bawah s 38(1) Akta tersebut dapat digunakan, maka peruntukan yang jelas harus dibuat mengenainya. Bagaimanapun tiada peruntukan seperti itu dibuat. Adalah pandangan kami tafsiran yang cuba diketengahkan oleh peguam perayu tidak dapat diterima kerana jika mahkamah ini berbuat demikian dengan memasukkan perkataannya sendiri untuk dipakai ke dalam Akta, ianya adalah bertentangan sama sekali dengan segala prinsip pentafsiran statut.

F [13] The true spirit and intent of the Electricity Supply Act 1990 is provided in the preamble as follows:

G An Act to provide for the regulation of the electricity supply industry, the supply of electricity at reasonable prices, the licensing of any electrical installation, the control of any electrical installation, plant and equipment with respect to matters relating to the safety of persons and the efficient use of electricity and for purposes connected therewith.

H [14] It is clear from the preamble that the said Act was to regulate the electricity industry; sufficient supply of electricity by the respondent and efficient and proper use of electricity by the consumer. As such, s 38(1) of the said Act was enacted to empower the respondent to act swiftly in the event that there is any breach or tampering by the consumer.

I [15] Furthermore, by virtue of the doctrine of stare decisis, the decision of the Court of Appeal in *Claybricks & Tiles Sdn Bhd* is binding on this court.

After careful perusal of all affidavits and considered all submissions raised by both parties, the objection by the respondent should be sustained; the application by the applicant is dismissed.

Application dismissed.

Reported by Mashrifah Ravendran

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